United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1575

To be argued by
PETER M. BLOCH

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1575

UNITED STATES OF AMERICA,
Appellee,

—v.—

REYNALDO RODRIGUEZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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Preliminary Statement

Reynaldo Rodriguez appeals from a judgment of conviction entered on November 19, 1976, in the United States District Court for the Southern District of New York, after a plea of guilty before the Honorable Morris E. Lasker, United States District Judge.*

* Rodriguez pleaded guilty subject to the express condition that he be permitted appeal to this Court the denial of his motion to suppress statements made by him on the day of his arrest. (Tr. 165-67). This Court has authorized this procedure. *United States* v. *Mullens*, 536 F.2d 997 (2d Cir. 1976); *United States* v. *Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States* v. *Pond*, 523 F.2d 210, 212 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States* v. *Burke*, 517 F.2d 377, 379 (2d Cir. 1975).

Superseding Indictment 75 Cr. 324, filed in four counts on March 28, 1976, charged Reynaldo Rodriguez and Adrian Garcia in Count One with conspiring to possess and to distribute cocaine in violation of Title 21, United States Code, Section 846.* Count Two charged both defendants with possession with intent to distribute and distribution of approximately 117.59 grams of cocaine in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Count Three charged Garcia with possession of a firearm during the commission of the felonies charged in Counts One and Two in violation of Title 18, United States Code, Sections 921(a)(3) and 924(c)(2). Count Four charged Garcia with use of a deadly or dangerous weapon in an assault on a federal officer in violation of Title 18, United States Code, Section 111.

Prior to trial Rodriguez moved to suppress all post-arrest statements made by him. On September 21, 1976, an evidentiary hearing was held before Judge Lasker at which time Rodriguez' motions were denied. On that date, Rodriguez pled guilty to Count Two of the Indictment.**

On November 19, 1976, Rodriguez was sentenced to imprisonment for one year and one day to be followed by a special parole term of three years. Rodriguez is presently serving his sentence.

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* Indictment 75 Cr. 324 superseded Indictment 75 Cr. 201 filed February 27, 1975. Defendant Rodriguez was a fugitive for the period covering at least October 1, 1975 to July 26, 1976, when he was arrested by New York City police officers on unrelated charges.

** The remaining count against Rodriguez was dismissed at sentencing on November 19, 1976.

Defendant Garcia pled guilty to Counts Two and Four on October 3, 1975, and on November 14, 1975 was sentenced to concurrent three year terms of imprisonment on each count.

Statement of Facts

The proof at trial would have shown that in the early morning hours of February 21, 1975 three Drug Enforcement Administration Agents William McMullan, William Schnakenberg and Robert Joura received a radio call from their base that an informant wished to speak to Schnakenberg.* Schnakenberg then went to phone, and contacted the informant who was known as "Roberto." Roberto, who was in a bar on Eighth Avenue, informed Schnakenberg that he was with two men, Adrian Garcia and Reynaldo Rodriguez who wanted to sell two one-eighth kilogram packages of cocaine. Schnakenberg then spoke on the phone with Rodriguez who said he would trust any friend of Roberto since Roberto knew Rodriguez' family. Rodriguez stated the price of the cocaine would be $4,000 per eighth kilogram. Schnakenberg then made arrangements with Roberto to have the transaction take place later that morning at 25th Street and Eighth Avenue, in New York City, where Agent Joura would pose as the buyer.

Meanwhile Garcia left the bar to pick up the cocaine. At about 2:30 a.m. Garcia returned and, accompanied by Rodriguez and Roberto, drove to the area of Eighth Avenue and 25th Street. There, Garcia and Roberto left Garcia's automobile and met with Agent Joura. Rodriguez remained in the car. After some discussion Garcia handed Joura an eighth kilogram of cocaine. Agent Joura then lifted the trunk of his own vehicle, pretending the money was in the trunk, thereby signalling other DEA Agents to make the arrest. As the trunk was lifted Schnakenberg, McMullan and DEA Agent William Mock-

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* This summary of proposed proof is taken from transcript of plea minutes of Adrian Garcia dated October 3, 1975, pages 14-19 along with Court exhibits 1, 2, and 3 of that date.

ler approached in a car, leaped out of the car, announced they were law enforcement officials, and told Garcia he was under arrest. Garcia, who had two weapons, pulled out a gun. McMullan shot at Garcia as he saw the weapon. A chase ensued in which Garcia shot at the agents several times. McMullan and Schnakenberg had to give up the chase, since McMullan had spent all his bullets and Schnakenberg's gun had jammed. Joura, who continued the chase somewhat longer lost sight of Garcia. A New York City policeman eventually found Garcia hiding under a dumpster, gun in hand.

The facts adduced at the hearing before Judge Lasker concerned the events which occurred after McMullan and then Schnakenberg gave up the chase of Garcia. Having given up the chase, Agent McMullan returned to 25th Street and Eighth Avenue and arrested Rodriguez in Garcia's automobile. (Tr. 50-51, 54). Agent McMullan handcuffed Rodriguez and started to advise Rodriguez of his *Miranda* rights, when in the words of the court below, "all hell broke loose." (Tr. 95). At that point Schnakenberg and Roberto returned to the scene, approaching from different directions. As they did so, Roberto pointed to Rodriguez and shouted to *Schnakenberg*, that Rodriguez was the person to whom Schnakenberg had spoken on the phone earlier that night. At this point Rodriguez cursed the informant, lunged at him, attempted to hit him with the handcuffs and told Roberto he was going to kill him. He swore at Roberto again. Only then did Rodriguez proceed to volunteer not only that he had indeed been on the phone with Schnakenberg,* but also that he had told Schnakenberg during the call that the cocaine to be supplied to Schnakenberg was not his.

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* Schnakenberg testified that Rodriquez' voice appeared to him to be the same as that of the person with whom he had spoken on the telephone.

(Tr. 13, 34-35).* Rodriguez went on to say that he had trusted Roberto because Roberto had said he knew Rodriguez' family. Schnakenberg directed Rodriguez to be quiet because he did not want to hear anything. (Tr. 14, 33, 47).

After this initial disruption, McMullan again tried to advise Rodriguez of his constitutional rights, but before he could finish doing so, Rodriguez repeated to Schnakenberg that "Yes, I'm the one on the phone with you . . . It wasn't my stuff. I told you I was going to send somebody for it that would be here in an hour but it wasn't mine and I didn't touch it" and that Roberto knew his family in Florida. (Tr. 14-15, 43, 51).

Finally, in the process of placing Rodriguez in the Government car for the purpose of driving him to the local police precinct on 19th Street, McMullan was able to give Rodriguez a full set of *Miranda* warnings which Rodriguez acknowledged he understood. Rodriguez stated he did not want to talk at that time. (Tr. 62). However, later during the car ride, Rodriguez again volunteered that he had spoken with Schnakenberg on the phone, that the cocaine was not his and that he had trusted Roberto because Roberto knew his family in Florida. (Tr. 15, 44). Rodriguez was then taken to DEA headquarters on 57th Street where about two hours after his arrest he again volunteered the same statements he had uttered three times before. (Tr. 19-20, 44). On none of the four occasions in which Rodriguez admitted to Schnakenberg that he had spoken to Schnakenberg about cocaine was Rodriguez' statement made in response to questioning by the agents. (Tr. 20, 52).

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* Where there is a conflict in the testimony as between Agents Schnakenberg and McMullan on one hand and Roberto on the other, the agents' version is given since their testimony was proffered by the Government as its view of the events of February 21, 1975 and since Judge Lasker specifically stated that he credited Schnakenberg and McMullan. (Tr. 95).

Judge Lasker citing the language of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), held *Miranda* to be inapplicable to all of Rodriguez' statements to Schnakenberg in that they were not the result of any interrogation by Government agents and were freely and voluntarily given without any compelling influence. (Tr. 112). The Court stated as follows:

> "I find in the circumstances of this case the statement made by Roberto was not intended to be nor did it in fact add up to be interrogation. To be sure if it was provocative in the sense that aroused the ire and anger of the defendant—but I believe the ire and anger was ready, because he recognized Mr. Roberto as someone whom he had trusted and who had become a double agent or a stool pigeon." (Tr. 112).

Further the Court found that Rodriguez knew what he was doing in making his remarks because he clearly volunteered the same statements on two occasions after he had been fully advised of his *Miranda* rights. (Tr. 113). In so ruling, the Court, rejected the notion still urged by Rodriguez (Br. 14) that all of his statements were part of one continuous emotional response. (Tr. 113).

ARGUMENT

Defendant's Admissions Were Voluntary Statements Made Without Interrogation and Should Not Be Suppressed.

A. Rodriguez' Initial Statements Are Excepted From *Miranda* Because They Were Volunteered and Entirely Free From The Compelling Influence of Custodial Interrogation

Rodriguez argues that the District Court should have suppressed his first two admissions that it was he who had spoken to Schnakenberg on the telephone about cocaine because the statements were made before *Miranda* warnings were given. Although the admissions were not obtained as a result of custodial interrogation, he claims they were nevertheless compelled by Roberto's accusation against him. Defendant's argument not only mischaracterizes the circumstances surrounding his statements, but also attempts to expand *Miranda* beyond its terms.

It is clear that the opinion in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was designed to protect defendants from the psychological pressure and compulsion inherent in custodial interrogation.* Where a statement is not the result of interrogation and is free from compelling influences, *Miranda* does not apply:

> "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper

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* As Rodriguez concedes, there is no question about the fact that *Miranda* does not extend to non-custodial interrogations. *Oregon* v. *Mathiason*, 45 U.S.L.W. 3505 (Jan. 25, 1977); *United States* v. *Mandujano*, 425 U.S. 564 (1976); *Beckwith* v. *United States*, 425 U.S. 341 (1976). *See also United States* v. *Falcone*, Dkt. No. 76-1237, slip op. 345, 351 (2d Cir., Nov. 1, 1976).

element in law enforcement. *Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.* There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls a police to offer a confession or any other statement he desires to make. *Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*" 384 U.S. at 478 (emphasis supplied).

In accordance with the language of *Miranda*, the Second Circuit has held that the *Miranda* does not apply to spontaneous or voluntary statements made in the presence of government agents. *United States* v. *Vigo*, 487 F.2d 295 (2d Cir. 1973).* In *Vigo*, the *Miranda* warnings were not completed when the defendant made statements at the scene of the arrest. Because "systematic inquiry" had not begun, the statements were said to fall

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* The same approach has been taken with respect to the requirements of *Massiah* v. *United States*, 377 U.S. 201 (1964). A spontaneous or voluntary statement to government agents does not violate the Sixth Amendment right to counsel as protected by *Massiah*. *United States* v. *Kaylor*, 491 F.2d 1127, 1131 (2d Cir. 1973), *remanded on other grounds*, 491 F.2d 1133 (2d Cir.), *vacated and remanded on other grounds*, 418 U.S. 909 (1974); *United States* v. *Gaynor*, 472 F.2d 899 (2d Cir. 1973); *United States* v. *Garcia*, 377 F.2d 321 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967); *United States* v. *Accardi*, 342 F.2d 697, 701 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965).

outside of *Miranda's* ambit. Indeed, this Court has held that even questioning about pedigree information is not custodial interrogation requiring *Miranda* warnings. *United States ex rel. Hines* v. *La Vallee*, 521 F.2d 1109 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976). The District Court explicitly found in this case that there was no interrogation. Under the law of this Circuit, it is clear that suppression was not warranted.

It is also evident that *Miranda* does not apply merely because the defendant's statement is made in reaction to contemporaneous police actions. Thus, in *United States* v. *Tafoya*, 459 F.2d 424 (10th Cir. 1972), cited with approval in *United States* v. *Purin*, 486 F.2d 1363 (2d Cir. 1973), *cert. denied*, 416 U.S. 987 (1974) and by both the majority and dissent in *United States* v. *Vigo*, *supra*, the defendant was arrested and, upon seeing his sister taken into custody, volunteered that "the stuff was mine." The Tenth Circuit held that such an admission, even in the absence of warnings, was "obviously not the product of interrogation but was simply a spontaneous utterance volunteered by the defendant." 459 F.2d at 427. Similarly, in *Gonzales* v. *Beto*, 425 F.2d 963 (5th Cir.), *cert. denied*, 400 U.S. 928 (1970), the arrest, in the defendant's presence, of another woman prompted the defendant to make statements exculpating her and implicating himself. These statements were held admissible.

Further legal support for Judge Lasker's conclusion can be found in the Fifth Circuit's opinion in *United States* v. *Sanchez*, 449 F.2d 204 (5th Cir. 1971), *cert. denied*, 405 U.S. 925 (1972). There, a police officer commented to a Mr. Joseph in the presence of the defendant that it appeared that 65 pounds of marijuana had been seized from the defendant. The defendant, who had not yet been given *Miranda* warnings, responded, "If that's

all there is then I got took. It looks like I got took." This statement, although clearly a response to what a law enforcement official said to a third party, was held to be entirely voluntary and admissible.*

Rodriguez candidly conceded in the District Court that he could find no case which was on all fours with his position. (Tr. 111). He attempts to avoid the impact of the cases against him by conjuring up a hypothetical case where a police officer does not give *Miranda* warnings and says to a defendant, "We know you buried the gun in your back yard," causing the accused to admit, "Yes, I buried it in my back yard." (Br. 12). The hypothetical is inapposite. First, as the District Court found, Rodriguez' statement was not, as in the hypothetical, an immediate response to a law enforcement officer's remark. Instead, it was blurted out at the end of a general tirade directed at the informant and instigated by the fact that the defendant felt betrayed. Moreover, the hypothetical which the defendant poses completely ignores the fact that no comment at all, much less a question, was directed *to Rodriguez*. Roberto's remark was directed to Schnakenberg following a very serious shooting incident in which both Roberto and Schnakenberg were involved. On these facts, there is simply no analogy to the case where a law enforcement officer attempts to cir-

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* Thus even if by using the word "yes" in indicating he had been on the telephone Rodriguez was somehow responding to Roberto's statement, *Miranda* still would not apply. Rodriguez, however, makes far too much of the use of the word "yes" in the testimony. Schnakenberg did not pretend that he could quote the defendant's exact words. Even if he had, in this context, "yes" was not a response to interrogation but was merely equivalent to saying, "*Indeed* Roberto was correct in saying I was on the phone, but it was not my cocaine."

cumvent *Miranda* by deliberately instigating a volunteered admission.*

This is not to say that if the agents devised a ruse to extract an admission from a defendant in an attempt to circumvent *Miranda* or any other rights of the defendant, the statements of that defendant would be admissible. This Court and others have indicated that "deliberately elicited" statements by surreptitious means should be suppressed. *United States* v. *Gaynor*, *supra*, 472 F.2d at 900; *United States* v. *Garcia*, *supra*, 377 F.2d at 324; *United States* v. *Tafoya*, *supra*, 459 F.2d at 427; *United States* v. *Godfrey*, 409 F.2d 1338 (10th Cir. 1969). However, here Judge Lasker specifically found that there was no intent to interrogate the defendant without *Miranda* warnings. In fact, Agent McMullan was at-

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* In addition, one Circuit has held that on the defendant's own hypothetical set of facts, the statements would not be suppressed. In *United States* v. *Martin*, 511 F.2d 148 (8th Cir. 1975), the agents attempted to search a defendant's house for narcotics pursuant to a search warrant but were unsuccessful in the attempt. After the search, the agent in charge remarked to the defendant that the agents were a day or so late in making their search. The defendant, who had previously been held at gun point, replied in agreement. The agent went on to say that the next time the defendant received drugs, the agents would come a little quicker. The defendant responded that there would not be a next time. The Court held:

> "*Assuming there was custody, it is clear that there was no interrogation.* The initial statement in this short conversation was, of course, made by the federal agent in charge, but it was not in any sense a question and it called for no response. The same is true of the second remark by the agent which followed the volunteered statement of the defendant." 511 F.2d at 151 (emphasis added).

A fortiori, in the instant case the remark directed to Schnakenberg, and not the defendant, did not call for a response much less four responses over a two hour period.

tempting to give the *Miranda* warnings to Rodriguez but was interrupted by him several times before he could finish doing so. In addition, Rodriguez kept on making his admissions even after he was specifically told to "shut up." *

Furthermore, suppression of the statements in the instant case would serve no useful purpose.

> "The (exclusionary) rule is calculated to prevent not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. *Elkins* v. *United States*, 364 U.S. 206, 217 (1960)." *Michigan* v. *Tucker*, 417 U.S. 433, 446 (1974) *quoting United States* v. *Calandra*, 414 U.S. 338, 347 (1974).

Here, an untrained informant was simply trying to communicate information to another officer in tumultuous circumstances, without any intention to extract a statement. As a result of general anger directed at the informant, and despite the attempt of officers to warn the defendant of his rights and keep him quiet, the defendant volunteered incriminating statements believing them to be exculpatory. On these facts, there is simply no behavior to deter. Thus, suppression of the statements would in no way effectuate Miranda's policy to prevent extraction of compelled confessions by police interrogation.

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* This fact contradicts the picture painted by Rodriguez of a defendant forced to make a denial in order to avoid being held to an admission by silence. In any event, Rodriguez' suggestion that his failure to make a denial would necessarily have been used against him overlooks this Court's decision in *United States* v. *Flecha*, 539 F.2d 874 (2d Cir. 1976).

B. Assuming *Arguendo* That the Initial Statement Was Inadmissible, the Statements Made After *Miranda* Warnings Should Not Be Suppressed

After he had been given full *Miranda* warnings and stated he understood them, the defendant admitted spontaneously, as he had twice before, that he had spoken with Schnakenberg on the phone, but that he was peddling someone else's cocaine. Rodriguez argues that these statements should be suppressed because they were part of the "same continuous statement, made in the same 'emotional' state, in a continuing response to what Roberto had said, without appellant ever having first calmed down and thus, with 'no break in the stream of events.'" (Br. 14). The court below correctly rejected this argument.

The District Court found the statements by Roberto "not to be continuous in time." (Tr. 113). The lack of continuity was demonstrated by several factors, including the defendant's expressed desire to remain silent after the first set of *Miranda* warnings were given to him. (Tr. 61).* Thereafter, although all interrogation had ceased, he chose to volunteer the fact that he spoke on the phone with Schnakenberg. The District Court found that these spontaneous remarks were not continuing, and that finding was amply justified on this record.

The only argument, therefore, remaining for suppression of the statements made after defendant was fully advised of his *Miranda* warnings is that they must be suppressed because "the cat was out of the bag" as a

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* Rodriguez never contended, nor was there anything in the record to support a contention, that the defendant's wish to assert his rights was anything but "scrupulously honored." *Michigan* v. *Mosely*, 423 U.S. 96 (1975).

result of the alleged "interrogation" made before Rodriguez received a full set of *Miranda* warnings. However, even if earlier statements which "let the cat out of the bag" are made in violation of *Miranda*, later statements may be admissible if the violation is cured and the later statements, considering the totality of the circumstances, are voluntary. *Tanner* v. *Vincent*, 541 F.2d 932 (2d Cir. 1976); *United States* v. *Knight*, 395 F.2d 971, 975 (2d Cir. 1968), *cert. denied*, 395 U.S. 930 (1969); *Knott* v. *Howard*, 511 F.2d 1060 (1st Cir. 1975); see *United States* v. *Bayer*, 331 U.S. 532, 539-41 (1947); *United States* v. *James*, 528 F.2d 999, 1018-20 (5th Cir. 1976).* In each of these cases later statements were admitted where an earlier statement was taken or assumed to have been taken in violation of the defendant's constitutional rights.

The admissibility of the later statements in this case follows *a fortiori* from the above-cited cases. Here, unlike the cited cases, the later statements were not extracted from the defendant by means of custodial questioning. Rodriguez had been told to "shut up," was given his *Miranda* warnings, knowingly asserted them, and yet spontaneously volunteered on two separate occasions that he was on the telephone with Schnakenberg, but that the cocaine was not his. The voluntariness of these statements is further indicated by the fact that they were apparently intended to be exculpatory on the mistaken theory that failure to actually possess the cocaine would be a defense to any criminal charges.

Clewis v. *Texas*, 386 U.S. 707 (1967), the only case cited by defendant for not admitting the post-*Miranda*

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* This is so even if the defendant is not told his prior statements are inadmissible. *Tanner* v. *Vincent*, *supra*.

warning statements, is clearly inapposite. There the Court specifically found (1) that the later statement was not voluntary; (2) that the defendant made the statement in question after being interrogated for over a week; (3) that there was a substantial concern that his faculties were impaired by inadequate sleep and food, sickness, long subjection to police custody and little or no contact with outsiders; and, above all (4) that at no time, even after arraignment was the defendant fully advised of his constitutional rights. Not one of these factors, much less all four, obtain in the present case.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A. - Affidavit of Service by Mail

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County of New York)

PETER M. BLOCH being duly sworn deposes and says that he ~~(she)~~ is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 3rd day of March, 1977 he ~~(she)~~ served a copy of the within brief with a second copy by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he ~~(she)~~ sealed the said envelope and placed the same in the mailbox for mailing at the United States Attorney's Office, Southern District of New York, One St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of Manhattan, City of New York.

Peter M. Bloch

Sworn to me before this

3rd day of March, 1977

Olga C. Grampp

OLGA C. GRAMPP
Notary Public New York State
No. 43-4620336
Qualified in Richmond Cty.
Comm. Expires March 30, 1977